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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CLARENCE E. DUNAHOO et al., Plaintiffs and Appellants, v. FOREMOST INSURANCE COMPANY, Defendant and Respondent.	E071307 (Super.Ct.No. RIC1702426) OPINION

APPEAL from the Superior Court of San Bernardino County. Linda L. Miller, Judge. (Retired judge of the Orange Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.). Affirmed.

Robert B. Salgado for Plaintiffs and Appellants.

Demler, Armstrong & Rowland, James P. Lemieux and David A. Ring for Defendant and Respondent.

In this insurance coverage dispute involving damage to a personal boat, Julie Bailey and Clarence Dunahoo (collectively, plaintiffs) appeal from an order granting summary judgment in favor of Foremost Insurance Company (Foremost). We affirm.

BACKGROUND[1]

A. *Family Boaters Insurance Policy*

Foremost issued a renewal family boaters insurance policy to Bailey effective May 3, 2015, to May 3, 2016, to cover the boat at issue. Bailey was the only insured and the only operator on the policy. The amount of insurance for "Coverage A—Watercraft" (some capitalization omitted) was $33,200, less a $500 deductible. "Coverage A of the [p]olicy insure[d] against 'risk of direct, sudden and accidental physical loss' to the [w]atercraft" unless the loss was otherwise excluded in the policy. Effective July 31, 2015, the policy was amended to add Dunahoo as an operator.

B. *July 2015 Damage Claim and Initial Denial of Coverage*

On July 31, 2015, a Farmers Insurance agent reported to Foremost that there was a "crack on [the] hull of [the] boat" and that the insured did not know how the damage occurred—on the water or on the trailer. The claimed loss date was July 25, 2015.

On August 3, 2015, a claims representative from Foremost spoke with Bailey about the claim. Bailey asked the representative to speak to Dunahoo because Dunahoo knew more about the boat. Bailey further advised that the boat had been taken to Tad

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1 "We accept all facts listed in [Foremost's] separate statement that plaintiffs did not dispute. We also accept all facts listed in [Foremost's] separate statement that plaintiffs *did* dispute, to the extent that (1) there is evidence to support them (Code Civ. Proc., § 437c, subd. (b)(1)), and (2) there is no evidence to support the dispute (Code Civ. Proc., § 437c, subd. (b)(3))." (*Doe v. California Lutheran High School Assn.* (2009) 170 Cal.App.4th 828, 830-831 (*Doe*).) We also consider all of Foremost's evidence to which the trial court overruled plaintiffs' objections, because plaintiffs do not challenge those rulings on appeal. (*Frittelli, Inc. v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th 35, 41.) "Finally, we accept all facts listed in plaintiffs' separate statement, to the extent that there is evidence to support them." (*Doe*, *supra*, at p. 831.)

Davis at Unlimited Boat Company. The claims representative spoke with Davis and asked for information regarding the cause of the loss, the estimate for repairs, and photos of the boat. Davis said that the boat had partially sunk, and water had entered into various parts in the engine. The transom plate had become loose. Davis indicated that the transom seal appeared worn out, and he opined that the transom also could be rotted. Davis was planning to tear down the boat the following week to perform an inspection, at which point he would have an estimate of the cost of repairs.

The claims representative spoke with Dunahoo about the claim on August 4, 2015. Dunahoo could not explain the cause of the damage to the boat. On July 24, 2015, the day before finding the boat partially sunk, Dunahoo spent some time on the water in the boat. He and Bailey had finally obtained a place to dock the boat. Upon returning to the boat the next day, Dunahoo found the boat full of water. Although the bilge pump was working, it was not keeping pace with the amount of water that was entering the boat. Dunahoo towed the boat out of the water as soon as he could. Bailey had owned the boat for approximately three-to-four years and had never had any issues with it in the past. However, the boat had never before been left in the water for such a long period. Dunahoo said that he would call Davis and authorize the teardown of the boat in order to determine what caused the damage.

On August 20, 2015, the Foremost claims representative spoke with Davis about the teardown. Davis said that the seal between the transom and the outdrive had flattened

over time, creating a groove in the transom that allowed water to enter the boat. Davis confirmed that the damage was not the result of impact.

On August 26, 2015, the claims representative received photos of the boat from Davis. The photos confirmed that the transom seal needed to be replaced and had worn out over time. The claims representative called Bailey and reviewed Davis's findings of the cause of loss with her. The representative explained that Foremost would not extend coverage to damage to the boat but would pay for the cost of the teardown. In a letter dated that same day, Foremost denied coverage for the damage based on "an exclusion in the policy for gradual deterioration and wear and tear."

C. *September 2015 Disclosure About the Purported Cause of Damage*

On September 28, 2015, Dunahoo and an associate of his, Merle Smith, spoke with the claims representative. Dunahoo amended his statement about what happened to the boat in July. He claimed to have dragged the outdrive on the bottom, which he claimed caused the damage. Smith was helping Dunahoo because Smith was more knowledgeable about boats and insurance. Dunahoo disclosed for the first time that when he had taken the boat out on the water the day before the loss, he had also taken it out of the water and that, in the process of being towed up the ramp, the boat kept getting caught "because he had erroneously left the trim tab down."

The boat remained at the repair shop with Davis. Davis advised Foremost that when he performed his initial inspection, he had not been told about Dunahoo's claim

that he had grounded the boat. Davis thought that the skeg looked like it was worn down, but he could not determine if it had sustained damage from an impact.

D. *Subsequent Investigation of Cause of Loss*

In October 2015, Dunahoo had the boat moved to another shop at Foremost's request, to get another opinion about the cause of loss. Davis could not confirm the cause of loss with the new information about the possible damage. Foremost paid Davis's shop over $800 for the tear down. Foremost advised Dunahoo that the claim would require further investigation.

E. *Foremost's Expert*

Foremost retained Todd Schwede, an accredited marine surveyor and certified marine investigator, to inspect the boat and to advise Foremost about what caused the water intrusion into the boat on July 25, 2015. In late October 2015, Schwede met with Smith at the new shop to inspect the boat. Foremost spoke with Smith and/or Dunahoo several times in the approximately two weeks after the inspection about the status of the report.

On November 17, 2015, Schwede issued a report regarding his inspection of the boat. Schwede concluded that in his "professional opinion" the flooding in the boat occurred "most likely as a result of multiple sources of saltwater incursions, all of which appear[ed], following inspection, to be directly associated with age related deterioration and corrosion events, over an extended period of time." On November 20, 2015, Foremost denied coverage for the loss again based on numerous policy exclusions

because "the damage [was] the result of lack of reasonable care, rust/corrosion, and gradual deterioration over time." Smith and Dunahoo asked Foremost to have the boat refloated. Schwede explained that a refloat of the boat would not provide any additional information about the cause of loss.

F. *Plaintiffs Dispute Foremost's Expert's Conclusion*

Foremost received a letter dated December 3, 2015, from Kells Christian, an accredited marine surveyor, on behalf of plaintiffs, opining about the boat and the cause of the loss. Christian disputed Schwede's findings and opined that "[t]he cause of loss [had] not yet been identified definitively." He recommended a refloat of the boat.

The boat was refloated in December 2015 with both experts and Smith present. In a January 2016 report about the refloat, Schwede opined that there were multiple possible causes of the leak but concluded that he did not observe any evidence "'indicat[ing] that the transom assembly had been moved, or disrupted, causing the vessel to take[] on water as a result of an apparent, or reported grounding, while the vessel was being hauled from the water."'

Foremost asked Smith and Bailey to provide Foremost with hoses that Schwede had noted were leaking. According to Smith, Bailey refused to supply the hoses. On February 4, 2016, Smith informed Foremost that the boat had been 90 percent repaired. On February 12, 2016, Foremost again denied coverage, noting that it had not received a report from Christian based on the refloat and that it could not have parts of the boat examined because of the substantial repair to the boat that had occurred already.

In March 2016, Foremost received a report from Christian dated February 29, 2016, in which he requested a second refloat because he believed that the cause of the leak could not be determined in the first refloat. After Foremost denied the claim again in March 2016, a second refloat of the boat occurred in April 2016.

G. *Coverage for the Sinking Claim*

Based on Schwede's report from the second refloat, in April 2016 Foremost concluded that it was possible that the speedometer hose had not been attached, resulting in the leak, and that the claim therefore could meet the definition of a latent defect as defined in the policy. Foremost paid the repair estimate for the collision loss of $3,475.24 less depreciation of $191.62 and the $500 deductible for a total of $2,783.62. Foremost also paid invoices submitted by Christian in the amount of $1,195 plus storage invoices of $822 for a total collision payment of $4,800.62. Foremost reimbursed Bailey for $613 for a slip rental. Because the cost of repair exceeded the policy limit, Foremost paid the partial sinking loss claim for the policy limit of $33,200 minus $2,783.62 paid for the collision loss payment for a total of $30,416.38. Of that amount, $29,381.83 was paid to Wells Fargo, the lienholder of the boat, and $1,034.55 was paid to Bailey.

H. *Summary Judgment Proceeding*

In February 2017, Bailey and Dunahoo filed an amended complaint against Foremost, alleging causes of action for breach of contract, bad faith, breach of the implied covenant of good faith and fair dealing, tortious breach of the implied covenant of good faith and fair dealing, and unfair business practices. Foremost moved for

summary judgment, arguing that (1) there could be no breach of contract because the policy limits were paid, (2) Foremost had not acted in bad faith because there had been a genuine dispute about causation, (3) Dunahoo did not have standing to sue for either claim because he was not an insured under the policy, and (4) plaintiffs were not entitled to punitive damages.

The hearing on the motion was scheduled for July 17, 2018. The trial court issued a tentative ruling. Pursuant to the local rule of court, the tentative ruling would become the court's final ruling "unless, by 4:30 p.m. on the court day before the scheduled hearing, a party gives notice of intent to appear to all parties and the court." (Superior Ct. Riverside County, Local Rules, rule 3316(B).) Neither party gave notice of intent to appear. At the scheduled hearing, the trial court did not allow plaintiffs' attorney to argue the merits of the motion because he failed to provide that notice.

Plaintiffs' attorney orally requested a continuance because he had received 75 or 85 new recordings from Foremost the day that the opposition was filed but after that filing. He provided no information, either orally or in writing, about the content of the recordings. According to Foremost's response to a discovery request, those recordings represented "all recorded calls [Foremost] was able to recover from its saved call recording database/system," "includ[ing] calls previously produced for purposes of presenting a comprehensive compilation of all recorded calls." The request for a continuance was denied because of plaintiffs' failure to file an ex parte application making that request before the hearing date.

The trial court granted summary judgment against plaintiffs. In so doing, the trial court overruled all of plaintiffs' evidentiary objections, because the objections were made in their separate statement.

STANDARD OF REVIEW

"[W]e review an order granting summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party." (*McNair v. City and County of San Francisco* (2016) 5 Cal.App.5th 1154, 1162.) "[W]e review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; Code Civ. Proc., § 437c, subd. (c).)[2] "On review of a summary judgment, the appellant has the burden of showing error, even if he [or she] did not bear the burden in the trial court," and "'to point out the triable issues the appellant claims are present by citation to the record and any supporting authority.'" (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230.)

[2] Further unlabeled statutory references are to the Code of Civil Procedure.

DISCUSSION[3]

A. *Dismissal of Dunahoo*

Plaintiffs contend that the trial court erred by concluding that Dunahoo does not have standing to sue Foremost because Dunahoo was not an insured on the date of loss. This contention lacks merit.

From the separate statement of facts, it is undisputed that the date of loss was July 25, 2015, or the previous day. The policy effective on those days did not include Dunahoo as an insured or an operator. Rather, Bailey was the only listed insured and the only listed operator. The policy was amended on July 31, 2015, to include Dunahoo as an operator. By the terms of the amended policy, the "amended declarations" for the policy became "effective 07/31/2015" and "supersede[d] any previous declarations bearing the same policy number for this policy period." (Boldface and capitalization omitted.) Given that the effective date of this amendment occurred after the date of loss, the amendment is inconsequential. Plaintiffs do not dispute that the policy effective on the date of loss is the relevant policy for determining coverage. Nor do they offer any intelligible argument refuting this analysis. We therefore conclude that the trial court properly dismissed Dunahoo from this lawsuit.

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3 This appeal was considered with case number E071096, a petition for writ of mandate filed by Dunahoo and Bailey after summary judgment was entered against them. Because the petition was taken from a grant of summary judgment, Dunahoo and Bailey had an adequate remedy of law—this appeal. We accordingly deny the petition in a separate order filed concurrently with this opinion. As such, none of the arguments contained in that petition is addressed in this opinion, unless the arguments were also made in the opening brief on appeal. We also do not consider any of the evidence submitted in support of the petition.

B. *Breach of Contract Cause of Action*

Bailey contends that she did "not receive all of the policy benefits" and therefore the trial court improperly granted summary judgment on the breach of contract cause of action. (Initial capitalization and italics omitted.)

In support of this argument, Bailey contends that "the newly provided recordings" demonstrate that Foremost "fraudulently withheld" $2,783.62 by forcing her to submit two claims—a collision claim and a sinking claim. Neither this theory nor the facts purportedly supporting it (the recordings) were before the trial court when it granted summary judgment. "'[I]n reviewing a summary judgment, the appellate court must consider only those facts before the trial court, disregarding any new allegations on appeal. [Citation.] Thus, possible theories that were not fully developed or factually presented to the trial court cannot create a "triable issue" on appeal.'" (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676.) Because this theory and this evidence were not presented to the trial court, we do not consider them.

The remaining argument about the purported nonpayment of the policy limit is forfeited, because it is not supported by any legal argument or citation to the record, except to claims notes about the amount that was paid, which is not in dispute and shows that Foremost did pay the policy limits.[4] (*United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 146 (*Malibu Hillbillies*).)

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[4] Similarly, Bailey does not cite any evidence in the record in support of her argument that there is a genuine issue of material fact that Foremost acted in bad faith. We therefore consider this argument forfeited too.

For these reasons, we conclude that Bailey did not carry her burden on appeal of demonstrating that a triable issue of fact existed on the breach of contract claim.

C. *California Unfair Competition Law (UCL) Cause of Action*

Bailey contends that she has "provided more than enough facts that would support a claim under the UCL." However, she fails to cite any evidence contained in the record in support of this argument. The single citation to the record provided to support this argument is to the amended complaint. Allegations in the pleadings do not create a triable issue of material fact. (§ 437c, subd. (p)(2) ["The plaintiff . . . shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists"].) Bailey has failed to carry her burden of demonstrating error.[5]

D. *Oral Argument on Summary Judgment Motion*

Dunahoo and Bailey contend that they "were denied their right to oral argument at the summary judgment hearing." The contention is meritless.

Rule 3.1308 of the California Rules of Court provides that a trial court may adopt one of two available tentative ruling procedures in civil law and motion matters. (Cal. Rules of Court, rule 3.1308(a), (b).) The Superior Court of Riverside County has adopted

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[5] Bailey did not challenge on appeal the judgment entered against her on the causes of action for contractual breach of the implied covenant of good faith and fair dealing and tortious breach of the implied covenant of good faith and fair dealing. Because we have concluded that Bailey did not carry her burden on appeal of demonstrating error on the remaining causes of action, we need not address her argument about punitive damages. "'Punitive damages are merely incident to a cause of action, and can never constitute the basis thereof.'" (*Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 391.)

such a rule. Local rule 3316 provides that tentative rulings "may issue" on civil law and motion matters. (Super. Ct. Riverside County, Local Rules, rule 3316(A).) "The tentative ruling shall become the ruling of the Court unless, by 4:30 p.m. on the court day before the scheduled hearing, a party gives notice of intent to appear to all parties and the court." (Super. Ct. Riverside County, Local Rules, rule 3316(B).)

Plaintiffs do not contend that the trial court failed to comply with the local rule or that the local rule is inconsistent with the California Rules of Court. Instead, relying on *Mediterranean Construction Co. v. State Farm Fire & Casualty Co.* (1998) 66 Cal.App.4th 257, 265 (*Mediterranean*), plaintiffs contend that "section 437c requires the opportunity for oral argument at summary judgment hearings." That is correct and irrelevant.

Pursuant to the procedure prescribed by the local rule of court, plaintiffs were afforded an opportunity to orally argue the summary judgment motion. After the tentative ruling issued, plaintiffs were required to provide notice and an intent to appear by 4:30 p.m. the day before the hearing if they wished to present oral argument. However, plaintiffs' attorney did not avail himself of that opportunity, because he failed to provide notice of intent to appear. By operation of the local rule of court, the tentative ruling therefore became the ruling of the court. The local rule provides that a tentative ruling "shall become" the court's ruling if the parties do not provide notice of intent to appear. (Super. Ct. Riverside County, Local Rules, rule 3316(B).) The trial court thus did not have discretion to entertain argument on the merits once the parties did not

provide notice of intent to appear. In any event, the trial court complied with section 437c by providing the parties with an opportunity to orally argue the summary judgment motion pursuant to the local rule. Nothing more was required.

E. *Continuance of Summary Judgment Hearing*

Plaintiffs argue that the trial court abused its discretion by failing to continue the summary judgment hearing either pursuant to subdivision (h) of section 437c or by exercising its discretion for good cause shown. We reject this argument.

Continuance of a summary judgment hearing is required "[i]f it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented." (§ 437c, subd. (h).) A party seeking to continue the motion to obtain necessary discovery may also file an ex parte application at any time on or before the date that the opposition is due. (§ 437c, subd. (h).)

"When a continuance of a summary judgment motion is not mandatory, because of a failure to meet the requirements of [section 437c, subdivision (h)], the court must determine whether the party requesting the continuance has nonetheless established good cause therefor." (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716 (*Lerma*); *Hamilton v. Orange County Sheriff's Dept.* (2017) 8 Cal.App.5th 759, 765 [granting of continuance under discretionary standard "requires a showing of good cause"].) Courts consider various factors when deciding whether good cause exists to continue a summary judgment hearing to allow additional discovery. (*Hamilton*, *supra*, at p. 765.) Those

factors include whether the request for a continuance could have been made earlier and "'whether the evidence sought is truly essential to the motion.'" (*Ibid.*) We review for abuse of discretion the trial court's denial of a party's request for a continuance when the request was not supported by an affidavit. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

Plaintiffs filed their opposition to the motion for summary judgment on July 5, 2018. At the summary judgment hearing nearly two weeks later on July 17, plaintiffs' attorney claimed to have received on July 5 "a dump of about 85 phone recordings [that plaintiffs had] been asking for since November of last year"—and "[plaintiffs' attorney] didn't receive them until after [he]'d already filed [the] opposition to the summary judgment." (Plaintiffs' attorney later indicated that he had received 75 recordings; plaintiffs on appeal claim that they were given 85 recordings of which 75 were new.) Counsel requested a continuance or, in the alternative, a motion for "reconsideration," explaining that he had not been able to file any request because he had been out of town conducting depositions for this case the previous week. The trial court denied the request because of plaintiffs' failure to comply with section 437c. However, the trial court indicated that it might, out of an abundance of caution, have granted the continuance had plaintiffs properly made such a request, and the court asked Foremost if it was willing to stipulate to a continuance. Foremost refused.

By failing to request a continuance either in their opposition or in an ex parte application on or before the date that the opposition was due, plaintiffs failed to fulfill the

requirements of subdivision (h) of section 437c. They therefore did not qualify for a mandatory continuance under the statute. (*Lerma, supra*, 120 Cal.App.4th at p. 716.) Plaintiffs contend nonetheless that the trial court abused its discretion by failing to grant their oral request for a continuance based on the recent disclosure of the recordings. The record contains no evidence, however, about the contents of those recordings. Plaintiffs' attorney did not make any offer of proof concerning those contents, why or how any information in the recordings would create a triable issue of material fact, or how the recordings were relevant to refuting any issue in the summary judgment motion. Plaintiffs therefore failed to make the requisite showing of good cause necessary to demonstrate that they needed a continuance. We therefore conclude that the trial court did not abuse its discretion by failing to grant plaintiffs' request to continue the summary judgment hearing.

DISPOSITION

The judgment against Bailey and Dunahoo is affirmed. Foremost shall recover its costs of appeal.

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MENETREZ
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.